

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AHMAD HEKMAT,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

NO. C14-1177-RAJ-JPD

## REPORT AND RECOMMENDATION

## I. INTRODUCTION AND SUMMARY CONCLUSION

This matter comes before the Court on the defendant's motion to dismiss plaintiff's complaint for judicial review of the denial of his applications for disability insurance benefits and supplemental security income payments pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Dkt. 8. Defendant argues that plaintiff has failed to exhaust his administrative remedies. *Id.* Plaintiff responds that he was denied a meaningful opportunity to be heard in violation of his constitutional right to due process, because he was arbitrarily excluded from his administrative hearing below. Dkt. 9. After reviewing defendant's motion, plaintiff's response, the governing law, and the balance of the record, the Court recommends that defendant's motion to dismiss, Dkt. 8, be DENIED, and that this case be REMANDED for an administrative hearing.

## 1 II. DISCUSSION

2 A. Standard of Review

3 A challenge to the Court’s subject matter jurisdiction is properly brought under Fed. R.  
 4 Civ. P. 12(b)(1). *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *see also Corrie*  
 5 *v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) (motion to dismiss attacking substance  
 6 of complaint’s jurisdictional allegations treated as if brought under Fed. R. Civ. P. 12(b)(1)).  
 7 Unlike motions to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6), “a Rule 12(b)(1)  
 8 motion can attack the substance of a complaint’s jurisdictional allegations despite their formal  
 9 sufficiency, and in so doing rely on affidavits or any other evidence properly before the court.”  
 10 *St. Clair*, 880 F.2d at 201; *see also Corrie*, 503 F.3d at 980. The party opposing the motion  
 11 then must “present affidavits or any other evidence necessary to satisfy its burden of  
 12 establishing that the court, in fact, possesses subject matter jurisdiction.” *St. Clair*, 880 F.2d at  
 13 201. As such, it is not an abuse of the Court’s discretion to consider such “extra-pleading  
 14 material,” even when “necessary to resolve factual disputes.” *Id.* Lastly, as is true for motions  
 15 brought pursuant to Fed. R. Civ. p. 12(b)(6), “all disputed facts” are to be “resolved in favor of  
 16 the non-moving party.” *Costco v. United States*, 248 F.3d 863, 865–66 (9th Cir. 2001);  
 17 *Murphy v. Schneider National, Inc.*, 362 F.3d 1133, 1139 (9th Cir. 2004); *McNatt v. Apfel*, 201  
 18 F.3d 1084, 1087 (9th Cir. 2000) (court favorably views facts alleged to support jurisdiction).

19 B. Plaintiff Has Failed to Exhaust his Administrative Remedies20 1. *The Exhaustion Requirement*

21 Judicial review of a claim for Social Security disability benefits is limited to review of  
 22 a “final decision of the Commissioner of Social Security made after a hearing[.]” 42 U.S.C. §  
 23 405(g). Section 405(g) reads in relevant part:  
 24

1 Any individual, after any final decision of the Commissioner of Social Security  
 2 made after a hearing to which he was a party, irrespective of the amount in  
 3 controversy, may obtain a review of such decision by a civil action commenced  
 4 within sixty days after the mailing to him of notice of such decision or within  
 5 such further time as the Secretary may allow.

6 Thus, this provision clearly limits judicial review to a “final decision” of the  
 7 Commissioner “made after a hearing.” *Califano v. Sanders*, 430 U.S. 99, 108, 97 S.Ct.  
 8 980, 51 L.Ed.2d 192 (1977).

9 The meaning of the term “final decision” in Section 405(g), however, is left to the  
 10 Commissioner “to flesh out by regulation.” *Weinberger v. Salfi*, 422 U.S. 749, 766, 95 S.Ct.  
 11 2457, 45 L.Ed.2d 522 (1975); *see also Mathews v. Eldridge*, 424 U.S. 319, 330, 96 S.Ct. 893,  
 12 47 L.Ed.2d 18 (1976) (“[U]nder s 405(g) the power to determine when finality has occurred  
 13 ordinarily rests with the Secretary.”). Under the regulations, a claimant obtains the  
 14 Commissioner’s final decision only after completing the four steps of the administrative review  
 15 process: (1) initial determination; (2) reconsideration determination; (3) hearing before an ALJ;  
 16 and (4) Appeals Council review. *See* 20 C.F.R. § 416.1400(a). As stated by the Ninth Circuit,  
 17 “[a] final decision has two elements: (1) presentment of the claim to the Commissioner, and (2)  
 18 complete exhaustion of administrative remedies.” *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9th  
 19 Cir. 2003) (citing *Johnson*, 2 F.3d at 921).

20           2.       *Plaintiff Was Denied Access to his Administrative Hearing on*  
 21                   *July 12, 2013 and August 14, 2013*

22 Here, it is undisputed that plaintiff was denied entrance to his administrative hearing on  
 23 two separate occasions based upon the type of photo identification he brought with him, and  
 24 therefore plaintiff was unable to fully exhaust his administrative remedies. The parties  
 25 disagree, however, regarding whether under the circumstances of this case, being excluded  
 26

1 from his administrative hearing violated plaintiff's due process right to a meaningful  
2 opportunity to be heard.

3 The Commissioner has submitted a declaration from Robert Weigel, Chief of Court  
4 Case Preparation and Review from the Office of Disability Adjudication and Review  
5 ("ODAR"), the department of the Social Security Administration which administers the  
6 nationwide hearings and appeals program. Dkt. 8, Att. 1 (Weigel Decl.) at ¶ 1. Mr. Weigel  
7 asserts that plaintiff requested a hearing by an administrative law judge related to his January  
8 3, 2012 applications for disability insurance benefits and supplemental social security income  
9 benefits, and a notice of hearing was timely mailed to the plaintiff. *Id.* at ¶ 3. Plaintiff also  
10 signed and returned the Acknowledgment of Receipt (Notice of Hearing) form, thereby  
11 indicating his intent to appear at the time and place scheduled for the hearing. *Id. See also*  
12 Dkt. 8, Ex. 1 at 52 (copy of signed form). Plaintiff actually did arrive at the ODAR office for  
13 his hearing on July 12, 2013, but was excluded on the grounds that he had improper ID to enter  
14 the hearing office. Dkt. 8, Ex. 1 at 60 (ALJ's Order of Dismissal dated October 22, 2013).

15 In the ALJ's Order of Dismissal, the ALJ notes that "a supervisor spoke with the  
16 claimant and at the undersigned's request, informed the claimant that if he could get adequate  
17 ID and waive the 20 day notice that he would be immediately added to another day of hearings.  
18 On August 8, 2013, claimant spoke with a member of the management staff at the Tacoma  
19 ODAR hearing office where he stated he was willing to waive a 20 day hearing notice, and that  
20 he would be representing himself. Claimant understood that ***he needed valid ID*** to enter into  
21 the hearing." *Id.* at 61 (emphasis in original). In addition, the ALJ states that "the claimant  
22 knew full well that the ID he presented at the hearing office on July 12, 2013 was inadequate  
23 and resulted in him being barred from entering the hearing." *Id.* Nevertheless, "the claimant  
24 did not appear at the hearing on August 14, 2013. His ID was again inadequate – he appeared

1 with the exact same ID that he knew from his last attempt to enter the hearing on July 12, 2013  
 2 was inadequate.” *Id.*

3 The ALJ entered an Order of Dismissal on October 22, 2013, stating that “since ODAR  
 4 does not have the authority to direct the highly trained security personnel that provide security  
 5 on matters of post security, claimant’s failure to get ID resulted in his failure to appear a  
 6 second time. Moreover, given the failure to appear with valid ID, validation of the identity of  
 7 the claimant is impossible would (sic) not be consistent with PII protocols.” *Id.*

8 The hearing office mailed a Notice to Show Cause for Failure to Appear to plaintiff on  
 9 September 5, 2013, but plaintiff did not respond within 10 days of that notice. Dkt. 8, Ex. 1  
 10 (Weigel Decl.) at ¶ 3. Mr. Weigel asserts that “[b]ecause the plaintiff did not follow the proper  
 11 procedures to actively pursue an appeal in this case, on October 22, 2013, the Administrative  
 12 Law Judge dismissed the plaintiff’s request for hearing.” *Id.* Plaintiff filed a request for the  
 13 Appeals Council to review the Administrative Law Judge’s dismissal order, but the Appeals  
 14 Council denied the plaintiff’s request for review on June 2, 2014. *Id.*

15 Because plaintiff was denied access to his administrative hearing, plaintiff has not  
 16 exhausted his administrative remedies as required by 42 U.S.C. § 405(g). That, however, is  
 17 not the end of the matter, as plaintiff alleges that his exclusion from the hearing based upon his  
 18 form of photo identification raises “a colorable constitutional claim of due process violation  
 19 that implicates a due process right either to a meaningful opportunity to be heard or to seek  
 20 reconsideration of an adverse benefits determination.” Dkt. 9 at 1-2 (citing *Dexter v. Colvin*,  
 21 731 F.3d 977, 980 (9th Cir. 2013)). As discussed below, the Court agrees with plaintiff.

22       C.     Plaintiff has Presented a Colorable Constitutional Claim

23 Plaintiff maintains the existence of a colorable constitutional claim giving rise to  
 24 subject matter jurisdiction. Dkt. 9 at 3. Specifically, he avers the denial of a meaningful

1 opportunity to be heard based upon his exclusion from the hearing on two separate occasions,  
2 despite the fact that he brought picture ID with him that he reasonably believed to be valid. *Id.*  
3 According to plaintiff, he “attempted on two occasions to appear at his scheduled hearings, but  
4 was denied entry into the hearing office by the Federal Protective Service security guard  
5 because [they] did not accept his form of identification.” Dkt. 8 at 2. Plaintiff asserts that he  
6 “presented an I-94 Arrival/Departure Record issued by the Department of Homeland Security.  
7 The I-94 had a photograph affixed to it, and an I-551 (Permanent Resident) stamp, known as an  
8 ‘ADIT stamp’ dated June 2015 on it. The stamp constitutes temporary proof of residence until  
9 a permanent I-551 is issued.” *Id.*

10 Plaintiff asserts that his I-94 with ADIT stamp indicated both that he was a resident and  
11 that he was employable, and contained his United States Customs and Immigration Services  
12 number. *Id.* Plaintiff contends that he reasonably believed that this was valid identification  
13 because the list of acceptable documents relied upon by the Federal Protective Service in this  
14 case included a valid, unexpired I-551. In addition, “the Social Security Administration itself  
15 will issue a Social Security card on the basis of an I-94 with an ADIT stamp.” *Id.* (citing  
16 POMS RM10211.0235).

17 Even if his I-94 with an ADIT stamp was not a proper form of identification, plaintiff  
18 contends that he reasonably believed he would be permitted to attend his hearing based upon  
19 the hearing notice’s description of acceptable forms of photo ID. Specifically, the notice  
20 provides:

21 You must bring valid picture identification (ID) to your hearing. Examples of  
22 acceptable picture ID include a:

- 23
- 24 • Current and valid U.S. State Driver’s license;
  - U.S. State-issued identity card;

- 1           •     Current U.S. passport; or
- 2           •     U.S. military ID/dependent military ID.

3     **If you do not have any of these forms of ID, please bring another form of picture**  
 4     **ID with you.** Proper ID is also required for your representative (if you have one), a  
 5     friend, or a member of your family who comes with you to the hearing. Without proper  
 6     ID, you may not be able to enter the building where your hearing is being held. This  
 7     could stop or delay your hearing.

8     Dkt. 8, Ex. 1 at 44 (emphasis added). Thus, the hearing notice suggested that “another form of  
 9     picture ID” would be accepted.

10    Finally, plaintiff asserts that “he is prepared to show that at least one other regional  
 11    hearing office has a procedure for allowing claimants without valid identification to be  
 12    admitted to their hearings, i.e., at the direction of the [ODAR], the security guards conduct a  
 13    telephonic background check of the claimant seeking admission to his or her hearing.” *Id.*  
 14    Thus, plaintiff claims that he was arbitrarily denied access to his hearing because his hearing  
 15    was scheduled at the Tacoma ODAR, which does not use such a procedure. *Id.* Plaintiff asks  
 16    for “an opportunity to prove his allegations” and submits that his case should not be denied at  
 17    this stage without a review of the full administrative record. *Id.* The Commissioner did not  
 18    submit a reply brief, or otherwise respond to plaintiff’s constitutional claim.

19    An exception to the administrative exhaustion requirement exists where a plaintiff  
 20    raises a “colorable” constitutional challenge to the Commissioner’s decision. *Califano v.*  
 21    *Sanders*, 430 U.S. 99, 109, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); *Subia v. Comm'r of Soc. Sec.*,  
 22    264 F.3d 899, 902 (9th Cir. 2001). The Ninth Circuit has held that “the Sanders exception  
 23    applies to any colorable claim of due process violation that implicates a due process right  
 24    either to a meaningful opportunity to be heard or to seek reconsideration of an adverse benefits  
 25    determination.” *Udd v. Massanari*, 245 F.3d 1096, 1099 (9th Cir. 2001). A constitutional  
 26    claim that is not “wholly insubstantial, immaterial, or frivolous” is colorable. *Klemm v. Astrue*,

1 543 F.3d 1139, 1144 (9th Cir.2008) (internal quotation marks and citation omitted). The mere  
2 assertion of a bare constitutional violation without supporting allegations is not a colorable  
3 constitutional claim. *Id.* “Rather, the claim must be supported by facts sufficient to state a  
4 violation of substantive or procedural due process.” *Id.* (internal quotation marks and citation  
5 omitted).

6 Considering the circumstances under which plaintiff appears to have been excluded  
7 from his hearing, the Court concludes that plaintiff presents a colorable constitutional claim of  
8 a denial of a meaningful opportunity to be heard. Plaintiff was not represented by counsel at  
9 the time of the administrative hearing dates in July or August 2013, or at the time of the ALJ’s  
10 dismissal of his request for a hearing in October 2013. Consequently, the ALJ’s assertion that  
11 “the claimant knew full well that the ID he presented at the hearing office on July 12, 2013 was  
12 inadequate and resulted in him being barred from entering the hearing” may not be accurate.  
13 Indeed, the ALJ purports to represent what the claimant *knew* about the validity of his photo ID  
14 without, apparently, having ever met with the claimant. The fact that the plaintiff attempted to  
15 attend his administrative hearing on a second occasion in August 2013 with the same form of  
16 photo identification is strong evidence that plaintiff’s understanding differed from what the  
17 ALJ believes it should have been.

18 As discussed above, the Court views the evidence in the light most favorable to  
19 plaintiff, and plaintiff asserts that he believed his photo identification – an unexpired I-94 with  
20 a photograph and ADIT stamp – was sufficient to obtain access to his administrative hearing.  
21 This belief does not appear to have been wholly unreasonable, based upon plaintiff’s evidence  
22 that the Social Security Administration will issue a Social Security card based upon an I-94  
23 with an ADIT stamp, and the hearing notice’s statement that some form of “valid picture  
24 identification” is all that is required to be admitted to a hearing. If the hearing notice sent to

1 plaintiff had provided an exhaustive list of acceptable forms of photo identification, for  
2 example, plaintiff's attempt to attend his hearing with a valid I-94 with an ADIT stamp may  
3 have been less reasonable.

4 Finally, the Court notes the ALJ's observation that the plaintiff recently suffered from  
5 "a recent exacerbation of a medical condition that may result in disability," and that based  
6 upon the objective medical information regarding this impairment, "special attention was  
7 provided to ensure he could again appear and get into the hearing." Dkt. 8, Ex. 1 at 61 fn.1.  
8 Because "the medical record at present does not support a fully favorable decision," however,  
9 the ALJ acknowledged that "a hearing needs to be conducted to assess whether a later onset is  
10 appropriate." *Id.*

11 Considering the above-described facts, it cannot be said that plaintiff's due process  
12 claim based upon his exclusion from the administration hearing, despite presenting what he  
13 believed to be valid photo identification, is wholly insubstantial, immaterial, or frivolous. On  
14 the contrary, plaintiff sets forth a colorable constitutional claim of a denial of a meaningful  
15 opportunity to be heard. The Court, therefore, has subject matter jurisdiction over this claim.

### 16 III. CONCLUSION

17 For the foregoing reasons, the Court concludes that plaintiff raises a colorable  
18 constitutional claim giving rise to subject matter jurisdiction, and recommends that the  
19 Commissioner's motion to dismiss, Dkt. 8, be DENIED. In addition, the Court recommends  
20 that plaintiff's motion to seal plaintiff's I-94 Arrival/Departure Record, Dkt. 10, be  
21 GRANTED.

22 Finally, in light of the ALJ's acknowledgment that "the claimant suffers from a recent  
23 exacerbation of a medical condition that may result in disability" and therefore "a hearing  
24 needs to be conducted to assess whether a later onset is appropriate," the Court recommends

1 that this case be REVERSED and REMANDED to the Commissioner for a *de novo*  
2 administrative hearing. Plaintiff is now represented by counsel, who can ensure that plaintiff is  
3 granted access to his hearing. A proposed order accompanies this Report and  
4 Recommendation.

5 Objections to this Report and Recommendation, if any, should be filed with the Clerk  
6 and served upon all parties to this suit by no later than **November 28, 2014**. Failure to file  
7 objections within the specified time may affect your right to appeal. Objections should be  
8 noted for consideration on the District Judge's motion calendar for the third Friday after they  
9 are filed. Responses to objections may be filed within **fourteen (14)** days after service of  
10 objections. If no timely objections are filed, the matter will be ready for consideration by the  
11 District Judge on **December 5, 2014**.

12 This Report and Recommendation is not an appealable order. Thus, a notice of appeal  
13 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the  
14 assigned District Judge acts on this Report and Recommendation.

15 DATED this 14th day of November, 2014.

16   
17 JAMES P. DONOHUE  
18 United States Magistrate Judge  
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